PREME COURT, U. S.

SEP

JOHN [illegible] CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 524

OCTOBER TERM, 1968

BOARD OF TRUSTEES OF ARKANSAS A. & M. COLLEGE, a body corporate, and DR. HOMER BABIN, President of Arkansas A. & M. College, ... *Petitioners*

v.

H. BRENT DAVIS, ... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

JOE PURCELL
Attorney General of Arkansas

DON LANGSTON
Deputy Attorney General

Justice Building
Little Rock, Arkansas 72201

Attorneys for Petitioners

PARAGON PRINTING CO., LITTLE ROCK

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provision & Statutes	3
Statement	5
Argument	9
Appendix A	16
Appendix B	22
Appendix C	30

STATUTES

28 U.S.C.A. §1254	2
28 U.S.C.A. §1292(b)	7
28 U.S.C.A. §1331	3, 4, 5, 7
28 U.S.C.A. §1332(a) (1)	3, 4, 5, 13
28 U.S.C.A. §1343(3)	3, 4, 5, 7, 13
42 U.S.C.A. §1983	3, 5, 7, 13
Ark. Stat. Ann. §80-3101 et. seq.	6, 7

CASE CITATIONS

American Comm. Ass'n., C.I. v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. ed. 925 (1950)	12
Antelope v. George, 211 F. Supp. 637 (D.C. Idaho 1962)	13

INDEX—(Continued)

Page

Arkansas v. Texas, 346 U.S. 368, 98 L. ed. 80, 74 S. Ct. 109 (1953) ____ 9, 10

Arkansas Board of Trustees of Arkansas A. & M. et al v. H. Brent Davis, 270 F. Supp. 528 ____ 2

Ex Parte Young, 209 U.S. 123 ____ 9

Hague v. Committee for Ind. Development, 101 F. 2d 774 (1939) ____ 13

In Re Ayers, 123 U.S. 505, 8 S. Ct. 164 ____ 9, 11

Jobe v. Urquhart, 98 Ark. 525 ____ 10

Mabery v. Western Casualty & Surety Company, 173 Kan. 586, 250 P. 2d 824 (1952) ____ 14

North Carolina v. Temple, 10 S. Ct. 509, 134 U.S. 30, 33 L. ed. 849 (N.C. 1890) ____ 11

Parker v. Board of Education of Prince George County Maryland, 237 F. Supp. 222, 348 F. 2d 464 (4 CCA 1965) ____ 11

Pitcock v. State, 91 Ark. 527 ____ 10

Pudlik v. Public Service Commission of Colo., 166 F. Supp. 921 (D.C. Colo. 1958) ____ 13

Smyth v. Flischmann, 214 S.C. 263, 52 S.E. 2d 199 (1949) ____ 14

State v. State Board of Control, 102 S.E. 688, 85 W. Va. 739 (1920) ____ 11

State v. University of Arkansas Board of Trustees, 407 S.W. 2d 916, 241 Ark. 399 (1966) ____ 10

The Allen Engineering Co. v. Kays, 106 Ark. 174, 152 S.W. 992 (1913) ____ 9

United Uublic Workers of America v. Mitchell, 330 U.S. 75, 95, 67 S. Ct. 556 (1947): Opinion of Justices, 332 Mass. 785, 127 N.E. 2d 663 (1955) ____ 12

Page

White, Inc. v. Metropolitan Merchandise Mart, Inc., 48 Del. 526, 107 A. 2d 892 (1954) ____ 14

UNITED STATES CONSTITUTION

Eleventh Amendment

(U.S.C.A., CONSTITUTION, Amendment 6 to 14 page 223) ____ 3, 9, 10, 11

First Amendment ____ 6

Fourteenth Amendment ____ 6

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12 (b) ____ 5

ARKANSAS CONSTITUTION

Arkansas Constitution, Article 5 §9 ____ 9

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 1967

BOARD OF TRUSTEES OF ARKANSAS A. & M. COLLEGE, a body corporate, and DR. HOMER BABIN, President of Arkansas A. & M. College, _____ *Petitioners*

v.

H. BRENT DAVIS, _____ *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

Petitioners petition this court for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review a judgment entered in this case on June 24, 1968, wherein the Circuit Court of Appeals for the Eighth Circuit affirmed the order of the United States District Court for the Eastern District of Arkansas, Pine Bluff Division, overruling petitioner's motion to dismiss the complaint.

OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Arkansas, Pine Bluff Division, is reported in 270 F. Supp. 528. The opinion and judgment of the United States Court of Appeals for the Eighth Circuit are not yet reported. A copy of the District Court opinion is set forth in Appendix A and a copy of the opinion of the United States Circuit Court of Appeals for the Eighth Circuit is set forth in Appendix B to this petition for certiorari.

JURISDICTION

The judgment sought to be reviewed in this case was entered on June 24, 1968. Jurisdiction of the United States Supreme Court to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case is by petition for Writ of Certiorari pursuant to 28 U.S.C.A. §1254.

QUESTIONS PRESENTED

1. The United States Court of Appeals for the Eighth Circuit erred in finding that state immunity to suit as guaranteed by the Eleventh Amendment to the Constitution of the United States does not extend to the State of Arkansas when acting through the Board of Trustees of Arkansas A. & M. College, a state agency. In other words, there is a lack of jurisdiction by the District and Circuit Courts over the subject matter of this action by reason of state immunity under the Eleventh Amendment.

2. The United States Circuit Court for the Eighth Circuit erred in holding that the complaint stated a cause

of action upon which relief can be granted and that breach of contract and tort were properly pled. In other words, there is a failure of the complaint to state a claim for relief which can be granted by a Federal Court.

CONSTITUTIONAL PROVISION AND STATUTES

The Constitutional provision involved herein is Amendment Eleven to the United States Constitution and can be found in U.S.C.A., CONSTITUTION, Amendment 6 to 14, page 223. The Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

The statutes involved herein are 42 U.S.C.A. §1983, PUBLIC HEALTH AND WELFARE, Page 98, 28 U.S.C.A. §1331 (a), JUDICIARY AND JUDICIAL PROCEDURE, Page 260, 28 U.S.C.A. §1332 (a) (1), JUDICIARY AND JUDICIAL PROCEDURE, Page 2, and 28 U.S.C.A. §1343 (3), JUDICIARY AND JUDICIAL PROCEDURE, Page 202.

Those statutes provide as follows:

> (1) 42 U.S. Code Ann. §1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(2) 28 U.S. Code Ann. §1331(a). The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(3) 28 U.S. Code Ann. §1332(a)(1). (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

. . .

(4) 28 U.S. Code Ann. §1343 (3). The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

STATEMENT

This is an action by the plaintiff, H. Brent Davis, aganist the Board of Trustees of Arkansas A & M College and its President Dr. Homer Babin, under provisions of the Civil Rights Act, 28 U.S.C.A. §1343 (3) and 42 U.S.C.A. §1983. The jurisdiction of the District Court was further invoked pursuant to provisions of 28 U.S.C.A. §1332 (a) (1) as between citizens of different states and the amount in controversy exceeded the sum or value of $10,000, exclusive of interest and costs.

The jurisdiction of the District Court was further based on the provisions of 28 U.S.C.A. §1331(a) as the matter in controversy exceeded the sum or value of $10,000, exclusive of interest and costs, and arising under the Constitution, laws, or treaties of the United States. The plaintiff seeks redress, the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution and laws of the United States. Both damages and injunctive relief are sought as a result of alleged termination of the plaintiff from employment by the Board of Trustees of the Arkansas A & M College.

A motion to dismiss the action was filed by the defendants pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure. In our motion to dismiss the defendants claim (1) state immunity, (2) the failure to state a claim upon which relief can be granted, and (3) that the complaint is based on a breach of contract in seeking damages in tort. It is, therefore, urged that the complaint be dismissed (a) because the court has no jurisdiction over the matter or (b) failure to state a claim upon which relief can be granted.

According to the Complaint, H. Brent Davis, plaintiff, a citizen of the State of Texas, was employed pursuant to a written contract with the Board of Trustees of Arkansas A & M College to teach in the Department of Languages and Literature of that College from August 1, 1965 to May 31, 1966 at a salary of $6,000.00.

Arkansas A & M College is a body corporate created by the General Assembly of Arkansas on April 1, 1909 and governed by a Board of Trustees appointed by the Governor of Arkansas. *Ark. Stat. Ann.* §§80-3101 et seq.

The complaint alleged through "its employee and agent defendant, Dr. Homer Babin," dismissed plaintiff without stating the reasons for his dismissal and without affording him a hearing in which to answer the charges against him. It appears that such employment was terminated October 31, 1965, in a letter dated October 29, 1965, from President Babin to plaintiff Davis in accordance with a policy decision made by the Board of Trustees of the College at its scheduled meeting October 28, 1965.

Plaintiff avers that the termination of his employment was a direct consequence of his activities relating to the abolition of corporal punishment in the Arkansas State Penitentiary and the ensuing publicity through the news media; that he had prepared a petition aganist corporal punishment, which was endorsed by "several" students.

The complaint further alleged that defendants, in summarily dismissing planitiff, had deprived him of his constitutional rights guaranteed under the First and Fourteenth Amendments, and had unlawfully breached the contract of employment to his irreparable loss, injury and harm.

Plaintiff sought injunctive relief to restore him to his former position with backpay and to restrain the defendants from thereafter terminating his employment by reason of activities protected by the federal constitution. He also prayed for a judgment for $25,000.00 in damages resulting from "family disruption, inconvenience, damages to reputation, inability to find other employment, and physical, mental and emotional suffering."

In its unreported order denying the motion the District Court refrained from specific discussion of the Eleventh Amendment issue. It found that jurisdiction existed for the reason that (a) Arkansas A & M College, organized pursuant to Sections 80-3101 — 30-3102, Ark. Stat. Ann., is a body "politic" and as such may sue and be sued as a legal entity; (b) the Civil Rights Statutes, 28 U.S.C.A. §1343(3) and 42 U.S.C.A. §1983 explicitly confer jurisdiction; (c) the complaint alleges diversity of citizenship and the requisite jurisdictional amount under 28 U.S.C.A. §1332; (d) there exists a federal question under the privileges and immunities and due process clauses of the Constitution, 28 U.S.C.A. §1331. In concluding that the complaint also asserted a claim for relief the Court stated:

> "The Court is of the opinion that such conduct [by the Board of Trustees] subjected the plaintiff to deprivation of his position as a member of the faculty which raises a question which can be determined only by testimony as to the privileges or immunities secured by the Constitution."

The Case was before the U. S. Court of Appeals for the Eighth Circuit on an interlocutory appeal under 28 U.S.C.A. §1292(b) from an order of the District Court denying defendants' motion to dismiss. The Circuit

Court affirmed the order of the District Court denying defendants' motion to dismiss and defendant's requested and were granted stays of the mandate in this case until September 16, 1968. The purpose of the stays of mandate being to allow defendants time to petition the U. S. Supreme Court for a writ of certiorari to the U. S. Circuit Court of Appeals for the Eighth Circuit.

ARGUMENT

The reason why we feel that certiorari should be granted in this case is because the 8th Circuit Court of Appeals has decided an important state question in a way in conflict with applicable state law and has decided a Federal question in a way in conflict with applicable decisions of this Court. We feel that the cases of *In re Ayers,* 123 U.S. 505, *Arkansas* v. *Texas,* 346 U.S. 368, *ex parte Young,* 209 U.S. 123 and the Eleventh Amendment to the United States Constitution need to be reconciled.

The Eleventh Amendment to the Constitution of the United States provides that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, prosecuted against one of the United States by citizens of another state. The Arkansas Supreme Court has ruled that a state college is an agency of the State, and, therefore, that the trustees of such a school partake of the State's immunity to suit. *The Allen Engineering Company* v. *Kays,* 106 Ark. 174, 152 S.W. 992 (1913). In that case, the Court stated:

> Appellees have no interest, whatever, in the property, in their individual capacity, nor connection with it, except as representatives of the State as trustees of said school. The school, itself, is but a governmental agency, not authorized by the statutes to sue and be sued and the recovery is sought under the terms of the contract made with this governmental agency necessarily involving its rights and being in effect and in fact but a suit against the State. No relief is sought against appellees in their individual capacity and none can be had against them as representatives of the agency of the State and its sovereignty, for our

> Constitution declares: 'The State of Arkansas shall never be made defendant in any of her courts.' Art. 5, §19; *Pitcock* v. *State*, 91 Ark. 527; *Jobe* v. *Urquhart*, 98 Ark. 525.

The Supreme Court of the United States has followed the same rule when dealing with the Board of Trustees of an Arkansas College or University. *Arkansas* v. *Texas, et al.*, 346 U.S. 368, 98 L.ed 80, 74 S.Ct. 109 (1953). In this case the controversy was between the Board of Trustees of the University of Arkansas and the State of Texas ex rel. the Attorney General. The problem before the Supreme Court was whether the Court had original jurisdiction.

The State of Texas alleged that the Court did not have original jurisdiction because the real party was the University of Arkansas Board of Trustees rather than the named plaintiff, the State of Arkansas. The Court disposed of this contention by stating: "But as we read Arkansas law the University of Arkansas is an official state instrumentality; and we conclude that for purposes of our original jurisdiction any injury under the contract to the University is an injury to Arkansas." *Arkansas* v. *Texas, supra*, p. 370. Here, the statutes that set up The Board of Trustees of Arkansas A. & M. College are similar to the University of Arkansas statutes, and, therefore, an injury under contract to Arkansas A. & M. College is an injury to the State of Arkansas, since the State of Arkansas is the real party in interest (see also *State* v. *University of Arkansas Board of Trustees*, 407 S.W. 2d 916, 241 Ark. 399 [1966]).

The United States Supreme Court, in interpreting Amendment Eleven, has ruled that this Amendment "must be held to cover, not only suits brought against a state

by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers,* 8 S.Ct. 164, 123 U.S. 505, 31 L.ed. 216 (1887). See, also, *North Carolina* v. *Temple,* 10 S.Ct. 509, 134 U.S. 30, 33 L.ed. 849 (N.C. 1890); *State* v. *State Board of Control,* 102 S.E. 688, 85 W.Va. 739 (1920).

Some of the cases construing the Eleventh Amendment have been determined on the basis of whether or not the State officer is acting within the purview of statutory or constitutional authority. That question is not applicable to this action because the appellee admits in paragraphs 6 and 7 of the complaint that the Board of Trustees was acting pursuant to the authority vested in it by the laws of the State of Arkansas in discharging the plaintiff. There is no allegation that the Board exceeded its authority. However, the complaint alleges that the discharge was motivated by activities by the appellee which are protected by the freedom of speech provision of the United States Constitution. Apparently, it is the appellee's theory that the statutes which authorize the firing are at least partially unconstitutional because they permit an abridgement of the appellee's freedom of speech. This theory has been specifically rejected in *Parker* v. *Board of Education of Prince George County, Maryland,* 237 F.Supp. 222, affirmed 348 F.2d 464 (4 C.C.A. 1965), wherein the Court stated:

> The factual allegations contained in the complaint, and in plaintiff's affidavit, show no denial of freedom of speech. It is claimed that Plaintiff's contract was terminated because a complaint had been received about his assigning and teach-

ing from the book *Brave New World*, and that the book was thereafter removed from the library. There is no allegation that plaintiff's personal right to free expression was in any way inhibited by the school authorities.

Even if such allegations were present, they would afford no ground for the relief sought in this case. The right of free speech or expression, like other First Amendment guarantees, is not absolute. Where the abridgement of the abstract right of free speech results from government action taken for the protection of other substantial public rights, no constitutional deprivation will be found to exist, *American Communications Ass'n, CIO* v. *Douds*, 339 U.S. 382, 70 S.Ct. 674, 94 L.ed 925 (1950). No unconstitutionality results where the right of free speech is reasonably curtained as a prerequisite to continued government employment. *Ibid*, at p. 398; *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 95, 67 S.Ct. 556 (1947): Opinion of the Justices, 332 Mass. 785, 127 N.E. 2d 663 (1955).

Although the facts in this case have not been determined by either a court or a jury, the appellants' proof will show that Mr. Davis was dismissed not for his stand on corporal punishment in the Penitentiary but for the inept way in which he conducted his class. There were many serious complaints brought to the Board's attention concerning Mr. Davis, and these have been partially outlined in our statement of facts and need not be reiterated here. It is our contention that the applicable law has been sent out and that, giving appellee every benefit of the doubt, he has no right to pursue his suit against the State of Arkansas under the Eleventh Amendment to the United States Constitution. Therefore, for the above cited reasons, we urge this Court to reverse the lower court.

Sections 4 and 14 of the complaint are based on the alleged breach of contract between the appellee and Arkansas A. & M. College. Jurisdiction is alleged pursuant to 42 U.S.C.A. §1983, 28 U.S.C.A. §1343(3) and 28 U.S.C.A. §1332(a)(1). 42 U.S.C.A §1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C.A. §1343(3) states the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person " . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . . " These statutes are concerned with the civil rights of a person and have nothing to do with a breach of contract, which was alleged here. *Pudlik* v. *Public Service Commission of Colorado*, 166 F.Supp. 921 (D.C. Colo. 1958); see also *Hague* v. *Committee for Industrial Development*, 101 F.2d 774 (1939), and *Antelope* v. *George*, 211 F.Supp. 637 (D.C. Idaho 1962). Arkansas A. & M. College is not alleged to have violated appellee's civil rights, i.e. such as freedom of speech, because they did not stop appellee from making any statements about any subject. He was dismissed because of his conduct in the classroom, and the only effect this had on his freedom of speech was taking away

a forum, i.e. a classroom, where he might espouse his views. Whether there was a breach of contract has nothing to do with the civil rights of the appellee and is a matter outside of the jurisdiction of a federal district court unless diversity of citizenship and an amount in excess of $10,000 is involved.

In order to substantiate damages in excess of $10,000 Appellee has relied on tortious damages as alleged in paragraph 15 of the complaint. According to the allegations in the complaint the original cause of action is for breach of contract on the part of appellants in discharging him from his employment. It is axiomatic that tortious damages do not apply to breaches of contract such as appellee has plead. *White, Inc.* v. *Metropolitan Merchandise Mart, Inc.*, 48 Del. 526, 107 A.2d 892 (1954); *Mabery* v. *Western Casualty and Surety Co.*, 173 Kan. 586, 250 P.2d 824 (1952); *Smyth* v. *Fleischmann*, 214 S.C. 263, 52 S.E. 2d 199 (1949).

Further, in paragraph 15 the allegations of damages and conclusions are without any connection to the allegations in the complaint which allegedly gave rise to this action. As to breach of contract, the appellee has failed to reduce his damages from the alleged breach of contract to the amount of loss the appellee suffered, that is the contract figure should be reduced by the amount the appellee has made during the contract period. Thus, without the amount claimed in paragraph 15 of the complaint and with the alleged breach of contract damages being reduced to the amount that should be claimed there is not in excess of $10,000 involved, and diversity of citizenship would not lie.

We submit that upon review of the judgment of the 8th Circuit Court of Appeals that that judgment be re-

versed and the cause remanded to the District Court with instructions to dismiss the complaint because the Court has no jurisdiction over the subject matter.

Respectfully submitted,

JOE PURCELL
Attorney General of Arkansas

DON LANGSTON
Deputy Attorney General

Attorneys for Petitioers